80-2058

Office-Supreme Court, U.S.
FILED
APR 23 1981
ALEXANDER L. STEVAS,
CLERK

No. .....

# In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT W. BOUTZ,
*Petitioner,*

VERSUS

FEDERAL AVIATION ADMINISTRATION,
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

RILEY BROCK
3801 Classen Boulevard
Suite 200
Oklahoma City, Oklahoma 73118
Phone: (405) 528-3132
*Counsel of Record for Petitioner*

April, 1981

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the termination of Petitioner, ROBERT W. BOUTZ, from his position as a GS-855-12 Electronic Engineer was effected in a lawful manner as a result of his declination to accept a proposed reassignment; the reassignment having been proposed as part of a "standard" (or mandatory) employee rotation program to which he did not agree when he was hired under a written "Employment Agreement."

2. Whether the Employment Agreement entered into between Petitioner Boutz and the Federal Aviation Administration was a contract, with fixed terms and conditions, or whether it was some other type arrangement to which the FAA was not bound, and which permitted the FAA to unilaterally change the obligations of the employee by merely revising the Agency Order which was made a part of the Employment Agreement and incorporated therein.

3. Whether a dispute over an employment contract between an employee and a government agency is entitled only to the narrow scope of review which is accorded to administrative decisions arising from an agency's application of purely regulatory orders; or, whether such disputes are to be treated as a matter of contract litigation with the contentions of both parties to it standing in *pari materia,* and with the interpretation of neither party being accorded any greater weight than that of the other.

4. Whether an Agency can lawfully contract with its own employee to extend or limit the administrative and regulatory authority granted to the Agency by law or executive order?

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTIONS PRESENTED FOR REVIEW | i |
| TABLE OF AUTHORITIES | iii |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| STATEMENT OF CASE | 2 |
| REASONS FOR GRANTING THE WRIT | 11 |
| ARGUMENT: | |
| I. The FAA's attempt to characterize the application of Handbook 3330.6A to the Petitioner as a "technicality" is an insult to the Record | 13 |
| II. Handbook 3330.6 became the terms of a contract and as such do not have the limited procedural review reserved for Agency regulations | 18 |
| III. The Petitioner's basic contractual rights have been ignored in order to implement Administrative and Regulatory authority and prerogatives | 19 |
| IV. The FAA has not addressed the fact that prior to the termination proposal the Petitioner was never informed that Handbook 3330.6 applied to him, but was repeatedly informed that Handbook 3330.6A was the only Handbook that applied | 22 |
| V. The existence of authority that might have been applied to the Petitioner is not sufficient grounds for the FAA to prevail | 24 |
| CONCLUSION | 25 |
| CERTIFICATE OF SERVICE follows Petition. | |
| APPENDIX is furnished under separate cover. | |

## TABLE OF AUTHORITIES


| Cases | PAGE |
|---|---|
| Barnes v. Townley, 448 P.2d 468 (Okla. 1969) | 19 |
| Harjo v. Harjo, 247 P.2d 522 | 20 |
| National Aviation Underwriters, Inc. v. Altus Flying Service, 555 P.2d 782 (10th Cir. 1977) | 19 |
| **Statutes** | |
| 5 U.S.C. 5595 | 10 |
| 28 U.S.C. 1254(1) | 2 |
| 15 Okla. Stat. 15 | 20 |
| **Miscellaneous** | |
| FAA Handbook 3330.6A, para. 31.b(1) | 3 |
| FAA Handbook 3330.6, para. 41(c) | 3, 19 |
| FAA Handbook 3330.6. para. 42(c)(1) | 3, 19 |

No. .....

# In the
# Supreme Court of the United States
OCTOBER TERM, 1980

ROBERT W. BOUTZ,
*Petitioner,*

VERSUS

FEDERAL AVIATION ADMINISTRATION,
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

## OPINIONS BELOW

This Petition for Writ of Certiorari is taken to the Judgment of the United States Court of Appeals for the District of Columbia Circuit, dated and entered on January 23, 1981, in consolidated cases Nos. 79-1178 and 79-1179, both styled, ROBERT W. BOUTZ, Appellant vs. FEDERAL AVIATION ADMINISTRATOR, Appellee. The Judgment of the Court of Appeals was without opinion and is unpublished. No Petition for Rehearing was filed.

The appeals to the Court of Appeals were taken to the decisions of the United States District Court for the District of Columbia in Civil Actions Nos. 77-1287 and 78-1108. There are no opinions by the trial court.

## JURISDICTION

The Supreme Court's jurisdiction to entertain this Petition for Writ of Certiorari is conferred by 28 U.S.C. 1254(1).

## STATEMENT OF CASE

The Petitioner was employed as a GS-855-12, Electronic Engineer at the FAA Aeronautical Center at Oklahoma City, Oklahoma on April 6, 1969, having previously been employed at Tinker Air Force Base, Oklahoma, by the Department of the Air Force.

As a now alleged condition of Petitioner's employment he was required to sign a "3R agreement" subject to the terms of FAA Handbook 3330.6 entitled, Reemployment, Restoration, and Return Rights (See Appendix, Exhibit 1). At the time of the Petitioner's employment the FAA Aeronautical Center obtained from the Southwest Region of the FAA an agreement that the Petitioner would have return rights to the Southwest Region in accordance with the provisions of Handbook 3330.6. This contract granted Return Rights for an initial period of two (2) years and was renewed, according to the terms of the Handbook, at the end of that initial two (2) year period for an additional two (2) years (See Appendix, Exhibit 2). Both the original agreement and the two (2) year extension agreements specifically incorporated Handbook 3330.6 into the agreement between the Petitioner and the Agency as the instrument which governed the relationship between the parties. The extension agreement further incorporates itself into and is made a part of the original agreement.

On July 27, 1971, which was more than three (3) months after Petitioner's two (2) year extension of the agreement, the FAA cancelled Handbook 3330.6 and adopted a revised and modified version of the Handbook and thereafter designated it as FAA Handbook 3330.6A. This revised Handbook contained the following added provision:

> "Paragraph 31.b(1) When an employee has served two consecutive tours of duty, he may at the option of the Aeronautical Center be returned to his parent organization. This option may be exercised on an individual case-by-case basis or by a standard rotation policy."

The revised edition also deleted the following provisions of Chapter 3:

> "41c. An employee who is eligible for reemployment rights must execute a new employment agreement within six months after the completion of his most recent tour of duty. Otherwise, his reemployment rights expire. (FAA Form 3330-51)
>
> "42c. When an employee has served threee tours of duty he may be returned to his parent organization, or he may forfeit his reemployment rights and remain at the Academy."

At the time of implementation of the revised Handbook 3330.6A, approximately one-half of the instructors at the FAA Academy had forfeited their return rights under this latter, deleted provision of the original Handbook 3330.6.

At all times from the inception of the Reemployment, Restoration and Return Rights Program (3-R Program) in the year 1962, until the promulgation of the revised Hand-

book 3330.6A in 1971, there was no attempt by the Academy Superintendent to force the rotation of any instructor (i.e., a forced reassignment) to one of the FAA Regional Offices. The FAA promoted and administered the program as an employee right to be exercised at the option of the employee.[1] Immediately after the promulgation of the revised Handbook however, it suddenly became the practice of the Academy Superintendent to force the rotation of all instructors after four (4) years. It is notable that at that time, any instructor who still had an active 3R agreement had been employed at a time when the agreement was made under the terms of the original Handbook which did not contain the provision for forced rotation or return of instructors after four (4) years.

In January, 1973, near the end of his fourth year, the Petitioner was requested to complete and sign a form electing to either exercise his reemployment rights or to extend them an additional two (2) years. The Petitioner did neither, but instead wrote across said form that he "elected to allow his return rights to expire" in accordance with paragraph 41(c) of 3330.6. This was an expiration of reemployment rights which would have been recognized by the Academy prior to conversion of the 3R Program from an employee right to a rotation program.

On February 7, 1973, the Academy Superintendent issued a letter to the Petitioner stating that 3330.6A was

---

[1] Appellant's second level supervisor (Mr. Robert Brown) stated to the Grievance Examiner that in the opinion of the instructors, the program as administered under the original Handbook, was an Instructor's avenue back to the field (position), was a recruitment aid and a right and benefit of the Instructor, and not an avenue to remove Academy Instructors from their position. (Appendix, Exhibit 3)

now controlling, that all instructors were required to rotate, that the Manpower Division was being asked to proceed to obtain a position for the Petitioner in his parent organization (Southwest Region), and that he could not accept the Petitioner's forfeiture of reemployment rights. (Appendix, Exhibit 3(a)).

In a meeting on February 14, 1973, the Petitioner was informed personally by the Academy Superintendent that he could not forfeit his reemployment rights, and that if a contractual obligation of the Petitioner to rotate to the Southwest Region did not exist, that he could still be transferred to the Southwest Region by authority of PTP 3330.9 which provides for "administrative reassignment and relocation" when such action is "considered to be in the best interest of the agency or civil aviation in general." (Petitioner and the Superintendent both included memorandums of this conversation in the Administrative Record, and they are located at Appendix, Exhibit 5.)

Petitioner thereafter filed an agency grievance. The Aeronautical Center Director denied relief to the Petitioner and concurred in the findings of the grievance examiner. The grievance examiner found that Handbook 3330.6A was the basis of the 3-R Program policy and that Handbook 3330.6 had been cancelled on July 27, 1971, with the issuance of Order 3330.6A; and that this was procedurally correct.[2]

---

[2] The Grievance Examiner stated as follows:

> "The principal Order and essentially the basis of Academy policy is Order 3330.6A, dated 27 July 1971, and titled Reemployment, Restoration and Return Rights. This Order cancels Handbook 3330.6, dated 3 November 1967." (Also see Appendix, Exhibit 18)

The Petitioner's Grievance was accepted for processing on March 2, 1973. It was also on March 2, 1973, that the Superintendent issued a policy letter to all instructors stating that ". . . there will be no changes in the current policy being followed on rotation and expressed in Orders 3330.6A and AC-3330.8B." On March 5, 1973, Petitioner's Branch Chief issued a policy letter stating, "Handbook 3330.6A and Order AC-3330.8B . . . provide the objectives and policies which will be followed in all decisions and actions relating to the 3-R Program." (See Appendix, Exhibits 6 and 7). NEITHER OF THESE POLICY LETTERS MADE ANY REFERENCE TO HANDBOOK 3330.6.

On March 16, 1973, the Southwest Region's office of the FAA in Fort Worth, Texas, in response to a request of the Academy Superintendent, offered a GS-855-12 (Engineering Technicians job) to Petitioner. By contrast to his encumbant professional position of GS-855-12, Electronic Engineer, requiring a high level of technical competence and responsibility, the offered position was a non-professional technicians position which primarily consisted of the manual installation of electronic equipment throughout the Southwest Region and required ninety percent (90%) travel. The Petitioner objected to this job offer by a letter of April 9, 1973, to the Academy Superintendent, but the letter was ignored and never answered. (Appendix, Exhibit 8).

By letter to the Academy Superintendent, dated April 16, 1973, the Petitioner declined the job offer from the Southwest Region in accordance with, and as authorized by paragraph 42(c) of Handbook 3330.6. (Appendix, Exhibit 5).

On May 4, 1973, the Academy Superintendent replied by letter as follows:

> "Therefore, while I sincerely regret that an adjustment suitable to you cannot be made, the only present recourse for you in order to retain your employment with the FAA is for you to fill the Southwest Region's job position. Your repeated declination of this job offer leaves me no recourse but to hereby direct your reassignment to the Southwest Region. If you refuse to comply with this relocation directive, you may be separated from the FAA.
>
> "So that we will know your positive intentions, please advise me in writing by May 21, 1973, your decision to comply with or refuse this assignment to the Southwest Region."

The Petitioner, at this time being uncertain of what his employee rights and status were, on May 18, 1973, requested the Academy Superintendent to furnish to him answers to the following questions:

> "As a result of your directing my reassignment to a GS-802-12 in the Southwest Region, and your proposed termination if I refuse the reassignment, I request clarification of the following points. Please give a specific answer to each question.
>
> 1. Does the FAA Academy consider the Employment Agreement and the subsequent extension to be a contract, which is binding upon me?
>
> 2. At this time do the terms of 3330.6 apply to me?
>
> 3. At this time do the terms of 3330.6A apply to me?

* * *

13. Under exactly what regulation, statute, executive order, or other authority has my reassignment been directed and how many Academy instructors have been reassigned under this authority in the past twelve months?

14. Under exactly what regulations, statute, executive order or other authority will I be terminated if I refuse the reassignment, and how many Academy instructors have been terminated under this authority in the past twelve months?" (See Appendix, Exhibit 10 for full text.)

In a May 21, 1973 conversation, the Superintendent demanded that the Petitioner give an immediate reply to his directed reassignment. The Petitioner and his attorney pointed out that the questions of May 18, 1973, had not been answered and that the Petitioner could not make an informed decision. Over the denials of the Petitioner and his counsel the Superintendent repeatedly stated that his official position was that the Petitioner's questions of May 18, had been "considered" in his recent grievance. A record of the conference was later supplied to the Petitioner and appears in the Appendix as Exhibit 11.

In a May 21, 1973 letter the Petitioner informed the Superintendent that under the circumstances he would remain passive with regard to the reassignment until, at least, his questions of May 18, 1973 were answered. (Appendix, Exhibit 12)

At no time did the Petitioner state that he would not relocate.

On May 25, 1973, the Petitioner signed for a hand delivered letter proposing his termination for ". . . your re-

fusal to accept a position change within the FAA which would carry out the terms of the established administrative Return Rights Policy for Academy Instructors." (Appendix, Exhibit 13). The letter referenced both Handbooks 3330.6 and 3330.6A. After the Petitioner signed for the letter of proposed termination he was then given a letter also dated May 25, 1973, which purported to be answers to his questions of May 18, 1973. (Appendix, Exhibit 14). The answers said that both Orders 3330.6 and 3330.6A applied to the Petitioner.[3]

The Petitioner responded by letter of 9 June 1973, in which he pointed out numerous errors and stated: "I have neither requested nor refused a reassignment." (Appendix, Exhibit 15)

A June 28, 1973 letter of decision removed the Petitioner from the FAA effective July 6, 1973, and referred only to Handbook 3330.6. (Appendix, Exhibit 16). On July 9, 1973, a Form 50 was issued to that effect. (Appendix, Exhibit 17)

At the Civil Service Evidentiary Hearing thereafter held, the Academy Superintendent testified:

"Q. Mr. Daugherty, during — at the time that Mr. Boutz was appealing to you and negotiationg with you for an alternate reassignment, or to remain

---

[3] The Academy Superintendent also answered as follows:

"13. Your assignment to the Southwest Region has been directed under authority of the 3-R Program. Program features were contained in 3330.6 and are now set forth in 3330.6A. There have been many instructors relocated under this authority." (See Appendix, Exhibit 14)

at the Academy as the case might have been, were you guided in your thinking and in the actions that you took by Handbook 3330.6, or 3330.6-A?

A. In Mr. Boutz's case, 3330.6, although we used 3330.6-A as a reference, because there was no change."

The Petitioner having exhausted his administrative remedies, thereafter filed suit in the United States District Court for the District of Columbia in Civil Action Number 77-1287. Also, on July 30, 1975, the Petitioner filed suit in the United States District Court for the Western District of Oklahoma, in Civil Action Number 75-0636-E to recover severance pay under Title 5 U.S.C. Section 5595 for his involuntary separation from service. Petitioner's request for relief in the Western District of Oklahoma was denied by Summary Judgment and he appealed this case to the United States Court of Appeals for the Tenth Circuit which reversed the District Judge and remanded the case for new trial. Thereafter the Government Agency filed a motion to transfer the Oklahoma case to the District of Columbia and that motion was granted and the case was transferred to the United States District Court for the District of Columbia as Civil Action Number 78-1108.

Both cases were assigned to the Honorable Gerhard Gesell, United States District Judge for the District of Columbia. On behalf of the Federal Aviation Administration, Government counsel filed a Motion for Summary Judgment in the reinstatement case (Civil Action No. 77-1287) and filed a Motion to Dismiss or in the alternative, for Summary Judgment in the severance pay case (Civil Action No. 78-1108).

On November 3, 1978, the Trial Judge below, without hearing, entered a final Order in each case, with each of these Orders stating that they were made upon a consideration of the entire record. The record in these cases includes over 900 pages of administrative record.

The orders entered by the Trial Judge on November 3, 1978, sustained the Government's Motion for Summary Judgment in Civil Action No. 77-1287 (reinstatement case), and dismissed the Petitioner's complaint in Civil Action No. 78-1108 (severance pay case).

Appeal was thereafter taken to the United States Court of Appeals for the District of Columbia Circuit, which, on January 23, 1981, entered a Judgment without opinion which affirmed the judgments appealed from. (Appendix, Exhibit 18)

## REASONS FOR GRANTING THE WRIT

The center of this case is a controversy concerning the rights and obligations of the Petitioner under a document with the dual status of being both a regulation and part of a contract. This document is designated as FAA Handbook 3330.6 and was incorporated by reference into an employment agreement between Petitioner and the Federal Aviation Administration (FAA).

Subsequent to the Petitioner agreeing to a second tour the FAA issued a revised document designated as FAA Handbook 3330.6A which purported to cancel the prior Handbook, and which further authorized and created an employee rotation program which was not included in the original Handbook 3330.6. The FAA Academy Superinten-

dent then informed all employees who had agreed to the terms of the original Handbook that they were under the exclusive control of the revised Handbook (3330.6A) and would be rotated. When the Petitioner was informed that he would have to rotate to a different geographic area under the authority of the revised Handbook (3330.6A), he objected and declined to accept a reassignment by stating that he was a passive element. The Agency then proposed, and eventually carried out his termination for refusing to accept a reassignment that would have carried out the terms of an "established policy". The letter of proposed termination (Appendix, Exhibit 13) referenced both Handbooks in support of the authority for the reassignment, while the letters of decision to terminate (Appendix, Exhibit 16) referenced only the original Handbook (3330.6). At the Civil Service Commission Hearing regarding the Petitioner's termination, the FAA Academy Superintendent stated that the reassignment was made pursuant to the original Handbook (3330.6). The record contains numerous documents dated up to and including the date of the Petitioner's termination proposal which state that the revised Handbook (3330.6A) was the basis for the reassignment. But the Record does not contain any documents dated prior to the Petitioner's termination proposal declaring Handbook 3330.6 to be the basis.

## ARGUMENT

### I. THE FAA'S ATTEMPT TO CHARACTERIZE THE APPLICATION OF HANDBOOK 3330.6A TO THE PETITIONER AS A "TECHNICALITY" IS AN INSULT TO THE RECORD.

The Petitioner contends that the application of Handbook 3330.6A to him was not an accidental, transitory, minor or a "technical" oversight by the FAA Academy, as declared by the Respondent[4] but was rather an on-going, concerted and pervasive effort of nearly two years duration, to deprive all persons who had agreed to the 3R program under Handbook 3330.6 of the rights, benefits and past practices of that document; and, to substitute in its place the obligations and demands of mandatory rotation under Handbook 3330.6A. Employees who objected to this effort were constantly informed that their only alternative to rotation was termination. Administration of the 3R program continued under the control of the revised Handbook 3330.6A even after the proposal to remove the Petitioner for allegedly violating Handbook 3330.6, and until at least 6 July 1973, when the Petitioner was terminated.

Disclosure of the complete Administrative practices related to the 3R program would expose the reason given for

---

[4] The Respondent's Appeal Brief stated:

> "Though we concede that his contention that Handbook 3330.6A was inapplicable is technically correct, it does not affect the outcome, for the procedures employed to remove him for improperly refusing reassignment did not infringe appellant's procedural rights, even if both Handbooks were applied, since neither contained language which modified or was inconsistent with his contractual obligations or rights."

the Petitioner's termination for what it was: a deliberate creation of a fictitious 3R policy of rotation under the control of Handbook 3330.6, which in fact did not exist at the time of Petitioner's employment or at any time in the past. Furthermore, that this "creation" was an attempt to fabricate a justifiable reason for the termination of Mr. Boutz as "punishment" for refusing to accept the actual policy of rotation under Handbook 3330.6A which was being applied to all other persons included in the 3R program without exception. The other persons had also entered into the employment agreement which incorporated Handbook 3330.6 into its terms and conditions.

The publication of Handbook 3330.6A altered the 3R program from a voluntary Return Rights Policy to a mandatory rotation policy which excluded Handbook 3330.6 and which was controlled exclusively by Handbook 3330.6A. This policy was applied to *all* instructors including the Petitioner. This fact can be confirmed by reading four references: (1) Feb. '73, letter from the Superintendent of the Academy to Petitioner (See Appendix, Exhibit 4); (2) 2 March '73 letter from the Superintendent of the FAA Academy to all Supervisors and instructors (See Appendix, Exhibit 6); (3) 5 Mar. '73, letter from the Petitioner's Branch Chief, W. M. Quitter, to all personnel (See Appendix, Exhibit 7); and (4) Findings of the Grievance Examiner (See Appendix, Exhibit 18 and preceeding footnote 2).

Faced with the application of a rotation policy which was authorized by Handbook 3330.6A, but which was not a part of the contract to which the Petitioner had agreed, he insisted on clarification of his individual status. When the clarification was deliberately withheld, the Petitioner

assumed a position of passivity with regard to the 4 May 1973 reassignment which was made pursuant to the 3R program. During early 1973 the Petitioner was only one of scores of instructors, none of whom were allowed to testify at the CSC Hearing,[5] who were objecting to having the terms of their contract unilaterally altered by the Sup-

[5] At the Civil Service Commission Evidentiary Hearing, the Hearing Examiner ruled as follows:

"HEARING EXAMINER: Thank you very much.

At this point I would like to give my decision on your request for these other witnesses.

MR. BROCK: All right.

HEARING EXAMINER: I believe I earlier read the names of these people into the record. And my understanding is that you would expect these people to testify concerning the return rights program and their experiences in connection with it, as compared to the experience of Mr. Boutz.

Is that generally correct?

MR. BROCK: And beyond that, to the overall administration of the 3R program. In other words, their testimony would bear relevance not really to their individual unique circumstances, but as to the employment, or administrative practices and policies which the Aeronautical Center Administration followed with respect to the total 3R program as it applied to everyone, which would include Mr. Boutz.

Now, possibly Mr. Carter is willing to make some stipulation in regard to that.

MR. CARTER: No.

HEARING EXAMINER: Let me say this. That based upon my reading of the record, as far as the contentions are concerned, the material that's already in the file concerning the program, it would be my decision that the testimony of these people would not be relevant and material to the case of Mr. Boutz. And on that basis I would decline to approve their attendance as witnesses."

erintendent's policy of substituting Handbook 3330.6A for the original terms to which they had agreed. In order to insure that the Superintendent's policy would remain the "established policy", the Superintendent ignored the Petitioner's statements of passivity, declared that the Petitioner's 16 April '73 declination of a job offer to be a refusal of a 3R reassignment that did not take place until the later date of 4 May '73, a chronologically impossible sequence (See Appendix, Exhibit 16, Letter of Decision), and fired him. In the Superintendent's letters which proposed and accomplished the Petitioner's termination, and in the testimony given at the CSC Hearing, the Superintendent claimed that the "policy" was such that Handbook 3330.6 was applied to the Petitioner with respect to the 3R program,[6] during the Spring of 1973. However, this conflicts directly and totally with the policy for this same period of time as contained in the record and stated by the Superintendent in letters (1) and (2) and confirmed by letter (3) cited in the preceeding paragraph and by the Grievance Examiner's Report (See Appendix, Exhibit 18 and footnote 2). The Petitioner alleges that had the CSC Hearing Examiner allowed the other requested witnesses to testify, that they would have confirmed that in the Spring of 1973 the 3R policy in effect denied *all* instructors, including third tour employees who had signed contracts under 3330.6, the use of 3330.6, and required rotation under 3330.6A. *The unstated reason the Petitioner was fired was to demonstrate to the FAA Academy personnel the wisdom*

[6] See quoted statement of Superintendent Daugherty contained in Statement of Facts, *supra.*

*of quietly accepting the Superintendent's policy of rotation by substituting 3330.6A for the terms of the contract to which they had agreed.* A reflection of this reason may be seen clearly in the FAA's statement that other instructors could not be expected to meet their obligations under the 3R program, unless the Petitioner was "punished" for refusing to meet his obligations.[7]

---

[7] At the Civil Service Commission Hearing the FAA presented the following persuasian to the Hearing Examiner:

"Also, if one instructor can refuse relocation under the provision of the 3-R Program without penalty, so could all the other approximately 250 or more instructors who are subject to the program. The net effect would be to negate the 3-R Program."

• • • •

"The removal action which was taken was management's only recourse if it expected to maintain a viable and continuing rotation program. If one instructor could refuse relocation, so could all the other approximately 375 instructors who are not subject to relocation. Should a ruling emerge which reinstates the Appellant, such ruling in effect washes out the FAA Administrator's rotational program.

"For these reasons, we urge that the Commission sustain the Deciding Official."

## II. HANDBOOK 3330.6 BECAME THE TERMS OF A CONTRACT AND AS SUCH DO NOT HAVE THE LIMITED PROCEDURAL REVIEW RESERVED FOR AGENCY REGULATIONS.

The Respondent successfully argued in prior proceedings that "Courts traditionally defer to an Agency's interpretation of its own regulations." It is the contention of the Petitioner that in this case such action by the court would deny Petitioner the equal protection of the law to which he is entitled. The Return Rights Agreement is much more than an Agency regulation. It is also a contract. The Petitioner has a right to allege that the Agency violated the contract and to receive a full judicial review of the merits of his complaint. This fundamental right should not be denied the Petitioner simply because certain terms and conditions of the contract were taken from Regulatory Handbooks or Orders.

Should the persuasiveness of the FAA's interpretation of the 3R program prevail, the Agency would become both the judge of the merits of alleged contract violations as well as the authority that sets the punishment for such acts, and the Agency's interpretation of it would be given unjustifiable persuasiveness. Confusion over the distinction between a regulation and a contract has precipitated errors by the FAA, the Civil Service Commission and the courts in rendering decisions in this case. The Petitioner is not challenging the Agency's broad authority to promulgate internal personnel instructions, directives and regulations, but rather the FAA's interpretation, administration and enforcement of a contract. The Petitioner contends that if the rights of any party are diminished by incorporating the terms of a contract into an agency regulation, then the act of incorporation itself becomes arbitrary and capricious.

## III. THE PETITIONER'S BASIC CONTRACTUAL RIGHTS HAVE BEEN IGNORED IN ORDER TO IMPLEMENT ADMINISTRATIVE AND REGULATORY AUTHORITY AND PREROGATIVES.

A basic rule of contracts is that "A contract should be construed as a whole or if reasonably possible, all parts of the agreement should be given effect." *Barnes* v. *Townley*, 448 P.2d 468, 471 (Okla. 1969); *National Aviation Underwriters, Inc.* v. *Altus Flying Service*, 555 P.2d 782 (10th Cir. 1977). If the interpretation of FAA is accepted, Handbook 3330.6, Chapter 3, Para. 41(c) and 42(c)(1) become useless nulities, totally at odds with the Agency's claim that the 3R program was an established rotation policy. Paragraph 41(c) states: "An employee who is eligible for employment rights must execute a new employment agreement within six months after the completion of his most recent tour of duty, otherwise, his reemployment rights expire." This term is consistent with the Petitioner's contention that the program had been intended and administered as a voluntary program and utilized as a recruitment aid. It is not the fault of the employee that the term seems to be inconsistent with other terms of the Handbook, and with the Agency's claim that the program was an established rotation policy. The Agency prepared the document and its instrinsic ambiguity that developed with the change of the policy in 1971 from a right of the employee to a rotation plan, should be held against the Agency and not the employee. Handbook 3330.6, Para. 42(c)(1) gives third tour employees the unilateral right to forfeit their return rights and remain at the Academy. This term clearly shows that the Agency did not intend for the contract under Handbook 3330.6 to be a mandatory rotation policy after two tours. The rotation plan that came about was not a part of the

Petitioner's contract, which does not even contain the word "rotation". Furthermore, the Petitioner alleges that had the testimony of the requested witnesses been allowed, it would have established the use and intent of Handbook 3330.6 at the time the parties entered into the contract and would have shown that a standard or mandatory, rotation program was not intended to be a purpose.

Title 15, Oklahoma Statutes, Section 15, provides: "A contract must be so interpreted as to give effect to the mutual intentions of the parties, as it existed at the time of contracting, so far as the same is ascertainable and lawful" and "where the contract was an ambiguous one and the meaning of the contract was in dispute, evidence of intrinsic facts and circumstances throwing light on the intentions of contracting parties is admissible." *Harjo* v. *Harjo*, 247 P.2d 522. The terms of Handbook 3330.6, Chapt. 3, are ambiguous and the meaning of the contract is in dispute. The testimony of witnesses who could have testified about past practices, which are circumstances that would have thrown light on the intentions of the parties, was denied. It is therefore clear that the refusal by the Hearing Examiner to allow the witnesses requested to testify was a procedural error which prevented the Petitioner from presenting admissible evidence. In like manner, it was a procedural error for the Hearing Examiner to prohibit the testimony of the Superintendent concerning the 225 instructors who were not in the 3R program.

When viewed from a contractual perspective the Agency's past practice is an unresolved and incomplete issue of material fact which is in dispute, and since the Petitioner

was denied an opportunity to present admissible evidence on this issue, the trial court's Dismissal/Summary Judgment was inappropriate.

The Petitioner is due the equal protection of the law. The fact that the Agency has the authority to reassign the Petitioner for the best interests of the Agency should not automatically mean that any reassignment in the best interests of the Agency could not breach the contract. When the Petitioner's contractual rights are isolated from Agency Administrative and Regulatory authority, the breach of contract by the Agency is crystal clear, while it is equally obvious that the Petitioner faithfully upheld his obligations.

The Agency has readily accepted the advantages of the contract, but it has placed limitations on its administrative and regulatory authority. The Civil Service Commission and the trial courts have failed to provide the Petitioner with due protection.

If the contracting of limitations on Administrative and Regulatory authority, which represent the intent of the Executive and Legislative branches of the Government, are in fact illegal, then the contract should be declared null and void and the Petitioner granted the relief he is seeking.

## IV. THE FAA HAS NOT ADDRESSED THE FACT THAT PRIOR TO THE TERMINATION PROPOSAL THE PETITIONER WAS NEVER INFORMED THAT HANDBOOK 3330.6 APPLIED TO HIM, BUT WAS REPEATEDLY INFORMED THAT HANDBOOK 3330.6A WAS THE ONLY HANDBOOK THAT APPLIED.

The following facts are irrefutable:

(1) On 7 Feb. '73, the Superintendent informed the Petitioner that Handbook 3330.6A is now controlling. (Appendix, Exhibit 4)

(2) On 2 Mar. '73 the Superintendent listed Handbook 3330.6A as the only Handbook applicable to the 3R program. (Appendix, Exhibit 6)

(3) On 5 Mar. '73 the Petitioner's Branch Chief stated that Handbook 3330.6A would be used in making all decisions on the 3R program. (Appendix, Exhibit 7)

(4) On 18 May '73 the Petitioner specifically asked the Superintendent, "At this time do the terms of 3330.6 apply to me?" (Appendix, Exhibit 10)

(5) In a May 21, 1973 meeting with the Petitioner and his representatives, the Superintendent repeatedly and deliberately refused to answer the questions posed by the Petitioner on 18 May 1973. (Appendix, Exhibit 11)

(6) On 25 May '73 the Petitioner received a termination proposal inferring that both Handbook 3330.6 and 3330.6A applied to him and that the reassignment was made under authority of the 3-R program which was controlled by Handbook 3330.6A. (Appendix, Exhibit 13)

(7) On 28 June '73 a letter of decision terminated the Petitioner for refusing to accept a position pursuant to the 3R program. Handbook 3330.6 was the only Handbook referenced. (Appendix, Exhibit 16)

In its Answer Brief on appeal the Agency made a point of "how squarely" the Superintendent informed the Petitioner that Handbook 3330.6 applied, while ignoring the fact that this "square" answer was not given until 25 May 1973, the very same day that the Superintendent proposed to terminate the Petitioner.

Prior to and even on the same day of his termination proposal, the Petitioner was repeatedly informed that Handbook 3330.6A was the only Handbook that controlled the 3R program, and the Superintendent steadfastly refused to answer the Petitioner's question: "At this time do the terms of Handbook 3330.6 apply to me?" The record could not be more clear. The response for which the Petitioner was fired was evoked by the repeated and consistent application of Handbook 3330.6A to him and the Superintendent's refusal to confirm that Handbook 3330.6 governed the Petitioner's rights. Under the record, no other conclusion is possible unless the Agency would like to argue that the Superintendent of the FAA Academy could only be believed after 25 May 1973 and that it was encumbant upon the Petitioner to know this.

The thrust of the Agency's argument is that in the Spring of 1973 the established 3R policy was such that FAA Academy personnel who had agreed to the 3R program under Handbook 3330.6 had been and were being rotated by that document and not Handbook 3330.6A. The record conflicts with that contention and raises a genuine issue of material fact.

## V. THE EXISTENCE OF AUTHORITY THAT MIGHT HAVE BEEN APPLIED TO THE PETITIONER IS NOT SUFFICIENT GROUNDS FOR THE FAA TO PREVAIL.

The brief of the Agency submitted on Appeal stated: "Though we concede that his contentions that Handbook 3330.6A was inapplicable is technically correct, it does not affect the outcome . . ." The Agency would have to be a prophet to know what the outcome would have been. The Petitioner's response to a reassignment might have been quite different had the reassignment not been made by applying an inapplicable handbook and a rotation plan authorized exclusively by that handbook to him. The issue is the propriety of the Petitioner's response to the application of Handbook 3330.6A to him, and not the Agency's prophecy or the existence of authority that might have been applied. The assumption of "identical outcome" is representative of the basis for every decision rendered in this case to date, and it is mortally flawed. The "identical outcome" thesis is equivalent to saying "the record shows that the FAA had available to it appropriate authority to take the action that it took and that is sufficient to determine that the Petitioner should not prevail, and we need not consult the record further." The Petitioner argues that "appropriate authority available" is not sufficient but irrelevant where that authority was not applied. The authority applied to the Petitioner was Handbook 3330.6A and it was not applicable to him. The position to which the Petitioner had been reassigned was beyond the organizational control of the FAA Academy, and available to the Academy by, and only by, exercising the contract. Therefore, the reassign-

ment that came about was not possible without the contract, and "rotation" was not authorized without Handbook 3330.6A. The trap that the FAA Academy set for itself cannot be overcome unless the Petitioner's contractual rights are declared to be subservient to the FAA's need and authority to establish a rotation plan.

The Petitioner further contends that the decision to remove him for his response to the Agency's application of Handbook 3330.6A to him was grossly erroneous, and that the election to terminate him by claiming that this same response was a violation of the terms of 3330.6 was arbitrary and capricious. Therefore, this case should have been litigated as a contract action on its full merits and not as a limited review of administrative proceedings.

## CONCLUSION

For the reasons set forth above, the Petitioner believes that this Court should grant and issue its Writ of Certiorari.

Respectfully submitted,

RILEY BROCK
3801 Classen Boulevard
Suite 200
Oklahoma City, Oklahoma 73118
Phone: (405) 528-3132

*Counsel of Record for Petitioner*

April, 1981

## CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of April, 1981, that three (3) copies of the foregoing Petition for Writ of Certiorari with its accompaning Appendix, were mailed to the following named parties, by placing same in the U. S. Mail, postage fully prepaid:

Wade Hampton McCree, Jr.
Solicitor General
Department of Justice
Tenth & Constitution Avenue
Washington, D.C. 20530

Mr. John Terry
Chief of Appellate Division
United States Courthouse
Washington, D.C. 20001

R. Bruce Carter
FAA Aeronautical Center
P. O. Box 25082
Oklahoma City, Oklahoma 73125

All parties required to be served have been served.

RILEY BROCK